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90-1700

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

NO_____

CURTIS L. WRENN
P. O. Box 203
Fort Drum, NY 13603,

Petitioner.

vs

STATE OF OHIO, MEDICAL COLLEGE OF OHIO; BOARD OF TRUSTEES, MEDICAL COLLEGE OF OHIO
3000 Arlington C.S. 10008
Toledo, OH 43699,

Respondents,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

QUESTIONS PRESENTED FOR REVIEW

This is a case in which the respondents obtained dismissal of petitioner's claims at the pre-trial level. If this Court grants the petition, it will have to decide whether the rights of the petitioner were abridged by the lower courts' decions. More specifically:

1. What weight, if any, under substantive law, the EEOC's determination of "reasonable cause" to believe discrimination has occurred, is to be accorded in determining whether a plaintiff has established a prima facie case of unlawful employment discrimination?

2. What weight, if any, the EEOC's determinaiton of "reasonable cause" is to be accorded in determining whether a plaintiff has established that there are triable issues and thus sufficient to overcome a defendant's motion for summary judgment?

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JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1), 1651 and 1915.

Jurisdiction is also invoked under the Constitution and laws of the United States, including but not limited to the Fourteenth Amendment, Title VII of the Civil Rights Act of 1964, as amended, and the Age Discrimination in Employment Act in that the decisions of the lower courts would deprive the petitioner of procedural due process and would deny him equal employment opportunity.

The jurisdiction of this Court is also invoked to review the actions of the lower courts, in that they have rendered decisions which if not reversed will contravene a Congressional intent. Also, the decisions are contrary to decisions of this Court and the other courts of appeals.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment I:

> Congress shall make no law ... abridging the freedom of speech ...; or the right of the people to peaceably ... to petition the Government for a redress of grievances.

United States Constitution, Amendment V:

> Nor shall any person ... be deprived of life, liberty, or property, without due process of law ...

United States Constitution, Amendment XIV:

> Nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

1. This is the third time this case and the issues contained therein have been presented to this Honorable Court. This case is brought on the basis of the newly discovered evidence at Appendix E.

2. This case presents an example of abuse of discretion by the lower courts. That is, the petitioner was denied the position of Executive Director because, allegedly he did not have a master's degree in business administration (MBA). There was no mention of the fact that the caucasian applicant who was hired also did not have the MBA, but like the petitioner has a master's degree in hospital administration (MHA).

3. The lower courts refused to consider the EEOC's determination of "reasonable cause" to believe the petitioner had been unlawfully denied the three positions at issue in this case. The central issue, therefore, is what weight, if any,

should be given to reports and/or findings by the federal agency responsible for interpreting Title VII of the Civil Rights Act of 1964, as amended.

4. If the decisions of the lower courts are allowed to stand a loud clear message will be sent to members of minority groups that the law that is supposed to guarantee them equal employment opportunity does not do what Congress apparently intended: fair treatment. The reason being is that the findings and/or reports of the federal agency which was established to ensure fair treatment has NO standing in the federal courts. If the decisions are not reversed, the question which must then be considered is "If the findings of the EEOC has no material value in the federal courts, why should the taxpayers fund such an agency?"

5. The argument below will demonstrate that the decisions of the lower courts are contrary to decisions of the other courts of appeals and this Court.

REASONS FOR GRANTING WRIT

ARGUMENT I: Petitioner's Prima Facie Claim

1. Under McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 93 S. Ct. 1817, 36 L.Ed.2d 668 (1973), a prima facie case of illegal employment discrimination is established by showing: "(i) that (an individual) belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." See, e.g., Hazelwood School District v. United States, Sup. Ct. Docket No 76-255, decided June 27, 1977.

2. Once a plaintiff establishes a prima facie case, he eliminates the most common nondiscriminatory reasons for plaintiff's rejection: the plaintiff's lack

of qualifications or the absence of a vacancy in the position sought. See, e.g., Texas Department of Community Affairs v. Burdine, 450 U.S. at 253-4, 10 S. Ct. at 1093-94.

3. Once the plaintiff's prima facie case is established, the burden shifts to the defendant employer to rebut the resulting inference of discriminatory intent. This burden shifting rule in Title VII cases is critical because in light of the prima facie case a trier of fact presumes that the employer's acts, "if otherwise unexplained, are more likely than not, based on the consideration of impermissible factors." See Furnco Construction Corp. v. Waters, 438 U.S. 567, 577, 98 S. Ct. 2943, 2949, 57 L.Ed.2d 957 (1978).

4. Evidence submitted to the district court demonstrated that the pertitioner is a member of the Negroid race, that he applied for and was qualified for each of the three

positions at issue, that, despite his qualifications, he was rejected, and that the employer continued to seek applicants from persons of complainant's qaualifications. The specific admissible evidence submitted included, but not limited to: (1) the EEOC's Determination at Appendix D, p. 19-23; (2) Affidavit of Plaintiff at Appendix G; and (3) plaintiff's responses to questions posed in the taking of his deposition. See also Appendix H and I.

5. In summary, the evidence supporting the plaintiff's prima facie case consisted of the EEOC's Determination of "reasonable cause" (three counts) where that federal agency presented unrefuted "proof" of the plaintiff's education, training and experience, plaintiff's affidavit where he detailed his education, previous experience and training, and his personal resume. Despite these unrefuted facts the district court did not directly address the question

regarding whether plaintiff established a prima facie case of illegal employment discrimination on the basis of race, retaliation or age. The language of the trial court's Opinion and Order (Appendix F), demonstrates that it found that the plaintiff failed to established his prima facie case of discrimination on the basis of race, age, or retaliation.

6. The plaintiff has argued throughout these proceedings that he proved discriminatory intent by a preponderance of the evidence. See Appendices D, E, G,H and I. See also, U.S. Postal Service v. Aikens, 105 S. Ct 2117, 31 F.E.P. 609, 611 (1983). The employer has offered various unsupported reasons why the plaintiff was not hired, including the statement that he was not hired for the position of Executive Director allegedly because he did not have a master's degree in business administration (MBA). The employer and the lower courts consistently overlooked the fact that the

person hired (Appendix E) also did not have the MBA but like the petitioner has a master's degree in hospital administration (MHA). Based on the facts in this case, the plaintiff should have been entitled to the opportunity to demonstrate during a trial that the proffered nondiscriminatory reason was not, in fact, the real reason he was not hired. See, Aikens, 103 S.Ct. at 1482 n.5.

7. The petitioner introduced and presented evidence to the lower courts to raise a factual question concerning pretext. The decisions of the lower courts (Appendices A, C and F), do not show that the plaintiff's admissible evidence was fairly considered in determining whether he had established his prima facie case of unlawful discrimination. The plaintiff lost his case at the pre-trial level because the district court erred AND abused its discretion in failing to recognize his prima facie case. Additionally, it appears that the district court was influenced in its

determination by the defendant's unsupported statement that the plaintiff was denied employment for the position of Executive Director because, allegedly, he did not have the M.B.A degree. The facts in the case clearly demonstrate that the person hired also did not have the M.B.A., but like the plaintiff, holds the M.H.A. Appendix E.

8. The trial court was also apparently influenced by an erroneous conclusion regarding the use of decisions by the EEOC when it stated "Plaintiff may not rely on EEOC determination as it is not evidence of a material fact." The trial court conveniently ignored the holdings of this Court and the other courts of appeals. Although determinatgions by the EEOC are not binding upon the federal courts, numerous other federal courts have recognized their value as evidence given the expertise of the EEOC in investigating and evaluating discrimination claims. See, e.g., Accord, Smith v. Universal Services, Inc., 454 F.2d

154, 4 F.E.P. 187, 188-189 (5th Cir., 1972); Plummer v. Western International Hotels, Inc., 656 F.2d 502, 26 F.E.P. 149 9th Cir., 1981); Blizzard v. Fielding, 572, 572 F.2d 13, 17 F.E.P. 149 (st Cir., 1978). The "material fact" in this case is whether the plaintiff presented proof of his education, training and experience AND whether he applied for positions which the employer was seeking applicants with the plaintiff's experience. The EEOC's determination is a clear unrefuted unbiased articulation of admissible evidence which the court should have received as "proof" of a material fact to support the plaintiff's prima facie case.

9. The trial court's decision regarding the EEOC's determination might be true providing the plaintiff relied solely on the determination by the EEOC to support his prima facie claim. Instead, he relied upon the determination of the EEOC to support his other facts and his arguments to the trial court. Appendix G-H.

10. In summary, the facts before the trial court, as demonstrated by the admissible evidence and pleadings (App D,E and G-I), clearly show that the plaintiff responded to the employer's advertisements seeking applications from individuals with his qualifications, that despite his qualifications he was denied employment for the three positions, and that the employer continued to seek applicants with his qualifications. McDonnell, supra.

11. The issue in this case is similar to the problem faced by this Court in Pullman-Standard v. Swint, 456 U.S. 273, 102 S. Ct. 1781, 72 L.Ed.2d 66. Here the court of appeal has committed an error in law in failing to consider relevant evidence with respect to the motive of the employer in refusing to hire the plaintiff for the three positions at issue. The Court of Appeals then made an independent consideration of the record and determined that the plaintiff was denied employment because "others had

better experience or education." The court cited no facts to support its conclusion. The reason being the employer nor the trial court cited no facts to refute the "proof" articulated by the EEOC in its determinaton of "reasonable cause" nor did the employer or the trial court cite any facts and/or admissible evidence to refute the plaintiff's affidavit (App G) or his pre-trial pleadings (App H-I).

12. Based upon the foregoing, the petitioner submits that he established, through admissible evidence, that he applied for vacant positions which the employer had advertised that it was seeking applicants, that he met the qualifications, but despite his qualifications he was not hired. Thus, based on this Court's guidelines established in McDonnel, the petitioner submits that he established a prima facie case of illegal discrimination on the basis of race, age, and retaliaiton. And as a result of the

trial court's refusal to acknowledge his prima facie case the case was lost.

13. This case turns on the trial court's acceptance of the "argument" of the counsel for the defendants that the petitioner was denied the position of Executive Director because he did not have a master's degree in business administration (MBA). In presenting its argument the counselor intentionally omitted the fact that the person hired did not have the MBA but like the petitioner had earned the MHA (App E). The argument should not have been accepted as evidence nor should it have been admitted as fact. See, e.g., Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 255, 101 S. Ct. 1089, 1094, 67 L. Ed.2d 207 (1981).

14. This case also turns on the EEOC's determination. This Court has previously held that "The construction of a statute by those charged with its execution should be followed unless there are compelling

indications that it is wrong, ..." See, e.g., Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 381, 39 S.Ct. 1794, 1802, 23 L.Ed 2d 371, 383-84 (1969). In the case at bar no "compelling indications" have been articulated by the employer or defendants.

II. ARGUMENT: Summary Judgment Not Warranted

1. All of the evidence before the court on a summary judgment motion must be construed in the light most favorable to the nonmoving party. It is also clear that the burden is on the moving party seeking summary judgment to clearly establish the nonexistence of any material issue of fact.

2. This case turns on one major disputed fact: the petitioner alleges that he was denied the position of Executive Director because of race, age and retaliation; the employer "argues" he was denied the position because he did not have the MBA. Instead of referring the issue for trial, the district court resolved the issue in favor of the employer. It is not the

function of the trial court at the summary judgment level to resolve any genuine factual issue. See, e.g., Rodriguez v. Board of Educ. of Eastchester U. Free School, 620 F.2d 362 (2d Cir. 1980). The district court's decision to accept the argument of counsel for the defendant was a clear abuse of discretion, in that the argument was not admissible or otherwise usable at trial. See, e.g., Association for Reduction of Violence v. Hall, 734 F.2d 63 (1st Cir. 1984), citing Treatise. Burdine, supra.

3. A motion for summary judgment places an affirmative burden on the moving party to demonstrate the absence of genuine issues of material facts and to show that he is entitled to judgment as a matter of law. In this case the employer did not meet this burden. See, e.g., Bell v. Cameron Meadows Land Co., 669 F.2d 1278 (9th Cir. 1982). See also, United States v. Diebold, 369 U.S. 654,655,82 S. Ct. 993, 8 L.Ed.2d 176 (1962).

4. This is a case involving the petitioner's allegation that he was denied employment for three positions because of his race (Negroid), age (date of birth February 14, 1930) and retaliation (for his previous opposition to employment discrimination made unlawful by the Constitution and laws of the United States). Complicated cases such as this are examples, as a general proposition, that should not be resolved at the summary judgment level. This is a case in which the petitioner has challenged the continuing action of the State of Ohio to deny him equal employment opportunity, since at least 1980. See. e.g.. Board of Education, Island Trees Union Free School District No. 26 v. Pico, 457 U.S. 853, 102 S. Ct. 2799, 73 L.Ed.2d 435 (1982).

5. The foregoing clearly demonstrate that the standards for granting summary judgment were not adhered to by the district court. The district court's granting of summary judgment in favor of the employer

was clearly erroneous. Accordingly, this Court should reverse.

CONCLUSION

The foregoing facts and arguments demonstrate that the decisions of the Sixth Circuit Court of Appeals are in conflict with this Court and the other courts of appeals. The Sixth Circuit method of deciding whether a plaintiff has presented a prima facie case should not be condoned by this Court. The Sixth Circuit is in serious conflict with this Court (McDonnel, Burdine and Furnco) and the other courts of appeals. Moreover, the Sixth Circuit's approach to deciding a motion for summary judgment should not be condoned by this Court.

Accordingly, this case should be reversed and remanded to the district court for trial.

Very truly yours,

Curtis L. Wrenn, Pro Se
P. O. Box 203
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Tel: (315(772-4025

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

NO_____

CURTIS L. WRENN
P. O. Box 203
Fort Drum, NY 13603.

Petitioner.

vs

STATE OF OHIO, MEDICAL COLLEGE OF OHIO; BOARD OF TRUSTEES, MEDICAL COLLEGE OF OHIO
3000 Arlington C.S. 10008
Toledo, OH 43699,

Respondents,

PETITIONER'S APPENDIXES

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No. 91-3009

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In Re: CURTIS L. WRENN, Petitioner.	)	O R D E R

BEFORE: MARTIN and BOGGS, Circuit Judges; and ENGEL, Senior Circuit Judge.

The petitioner seeks a writ of mandamus directing the district court to re-open Dist. Ct. No. C82-256, Wrenn v. State of Ohio, et al., an employment discrimination action in which summary judgment was entered for the defendants. The petitioner asserts such relief is necessary because the district court's decision was "not supported by the facts in the case" and was "clearly erroneous." In response, the district court has submitted a copy of its docket sheet.

The district court granted summary judgment to the defendants in Case No. C82-256 on November 30,

1988. On direct appeal, this court affirmed, Wrenn v. State of Ohio, et al., No. 88-4188 (6th Cir. Unpublished Order of November 30, 1988), and the United States Supreme Court denied the petitioner's application for a writ of certiorari. Wrenn v. Ohio, 111 S.Ct. 43 (1990). A review of the papers and briefs filed with this court as part of the direct appeal shows the allegations underlying the present petition were presented to the court at that time.

It is settled law that a mandamus petition cannot be used as a substitute for an appeal. City of Cleveland v. Krupansky, 619 F.2d 572, 575 (6th Cir.) (per curiam), cert. denied, 449 U.S. 834 (1980). That principle is particularly true here where the petitioner has already been afforded full appellate review and advances arguments already rejected by the court. Those issues are now res judicata.

It therefore is ORDERED that the petition for a writ of mandamus is denied.

ENTERED BY ORDER OF THE COURT

/s/Leonard Green

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CURTIS L. WRENN
P.O. Box 203
Fort Drum, NY 13603
Tel: (315) 772-6102,

91-3009

Petitioner.

RE: Curtis L. Wrenn v. State of Ohio, Medical College of Ohio, Board of Trustees, Medical College of Ohio, Docket C 82-256, USDC ND Ohio.

PETITION FOR WRIT OF MANDAMUS

COMES NOW the petitioner to respectfully ask this Honorable Court, pursuant to Rule 21(c) of the Federal Rules of Appellate Procedure, to issue a Writ of Mandamus and an order directing the United States District Court for the Northern District of Ohio to reopen the above captioned case. As grounds for this extraordinary request, the petitioner submits that:

1. This court's decision (Docket No 88-4188, November 27, 1989) that "others had better experience or education" is not supported by the facts in the case.

2. The USDC's decision that "plaintiff has failed to present specific facts" is clearly erroneous.

3. The courts did not consider important material facts, and this led to an erroneous application of the law.

4. The most important omission by the courts was the educational requirements for the position of Executive Director, and that failure to consider and/or compare the petitioner's education with that of the successful applicant led to a decision which is clearly erroneous.

I. STATEMENT OF THE FACTS

1. The pertinent facts and/or decisions at issue in this case are demonstrated by the following Exhibits which are incorporated herein expressly by reference:

Exhibit 1 - This court's decision of November 27, 1989 in Docket No 88-4188.

Exhibit 2 - Opinion and Order of the USDC of November 30, 1988.

Exhibit 3 - Transcript of petitioner's

Degree of Master of Hospital Administration (MHA).

Exhibit 4 - Affidavit of Curtis L. Wrenn

Exhibit 5 - Documents and things from petitioner's personnel file as maintained by the Department of Mental Health, Office of Human Resources.

Exhibit 6 - News Stories from The Toledo Blade

Exhibit 7 - The Employer's Articulated Reason for not Hiring the Petitioner.

2. The facts as demonstrated by Exhibits 3 through 7 clearly show that:

a. The employer was seeking applicants who had either the MBA or MHA degree for the position of Executive Director. See Exhibit 7 and 6 (page 1).

b. The petitioner and the successful applicant (a white male) for the position each has the MHA degree and not the MBA. See Exhibit 6.

c. The employer's articulated reason (Exhibit 7) for not hiring the petitioner for the position of Executive Director, that "Wrenn did not possess a MBA", is clearly not a legitimate business

reason for rejecting his application. If that reason continues to be accepted by the courts, then the obvious question is why was the successful white applicant hired when apparently he did not have the "required MBA", but like the petitioner has a MHA.

d. The employer was acutely aware that the petitioner possessed the requisite educational requirements for the position of Executive Director. See Exhibits 3, 4, (page 1), 5 (page 4 and 5) and 6 (page 2).

e. The employer's argument at Exhibit 7 that "Wrenn did not possess a MBA" is at best an incomplete statement. More importantly it is a malicious attempt to mislead the courts, by having the courts draw the wrong conclusion, that is that the employer was only seeking a person with the MBA.

II. STATEMENT OF THE ISSUES

1. Whether, on the basis of the facts before it (especially Exhibit 4), the district court abused its discretion when it granted summary judgment to the employer.

2. Whether the district court's decision to

grant summary judgment in favor of the defendant was clearly erroneous.

3. Whether, on the basis of the facts in this case, the decisions of the courts are clearly erroneous, in that the decisions are not supported by the facts or applicable case law.

4. Whether the courts' refusal to acknowledge that the petitioner had demonstrated a prima face case of unlawful employment discrimination led to an erroneous interpretation of the law concerning a plaintiff's obligation in a disparage treatment case based on race, age and retaliation.

III. LEGAL ARGUMENTS

1. This is a mixed-motive case in which the petitioner (a Negroid male over the age of 40) alleges that the State of Ohio refused to hire him for three positions because of his race (Negroid), and/or age (date of birth February 14, 1930), and/or retaliation (for his previous opposition to employment practices made unlawful by the Constitution and laws of the United States, including but not limited to Title VII of the Civil

Rights Act of 1964, as amended, and the Age Discrimination in Employment Act).

2. Petitioner submits that the district court abused its discretion and rendered a clearly erroneous decision when it awarded summary judgment to the defendants. First, the petitioner clearly demonstrated a prima facie case of unlawful employment practice by showing that : (1) he responded to the employer's advertisement seeking applicants with his qualifications by submitting his detailed resume, (2) he met the published requirements for each position which he applied, (3) he was not interviewed, (4) the employer was aware of his race and that he was over 40, (5) his applications were rejected despite his qualifications, (6) the employer continued to seek applicants with his qualifications and experience, and (7) the employer was aware of his previous "opposition" to employment discrimination and his "participation" in legitimate civil rights activities. See, e.g., Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253

(1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

3. Secondly, the employer in this mixed-motive case has not demonstrated that there were no genuine triable issues in this case and that it was entitled to summary judgment. The facts, especially Exhibit 6, do not support the employer's contention that there are no genuine issues. One paramount issue is the apparent similarity in the educational background of the petitioner and the successful white applicant. Thus there was at least one triable issue which clearly demonstrated that summary judgment was not appropriate. Summary judgment is particularly inappropriate in cases alleging discrimination where an examination of motive and intent is involved. See. e.g., Rodriquez v. Bd. of Educ. of Eastchester Unior Free School Dist., 620 F.2d 362, 367 (2d Cir. 1980); Smith v. Hudson, 600 F.2d 60 (6th Cir. 1979).

4. Petitioner's third and final argument is that the employer in this mixed-motive case did not prove by a preponderance of the evidence that it would

have made the same decision even if the petitioner was of a different race (i.e., white) or if he had not previously opposed perceived unlawful employment discrimination by the State of Ohio. The facts in this case clearly show that the employer's articulated reason for rejecting the petitioner's application for the position of Executive Director (Exhibit 7) must be rejected by the courts, if for no other reason that the successful white candidate, like the petitioner, does not have a MBA. Thus the articulated reason cannot be accepted as the "real" reason for rejecting the petitioner's application for the position of Executive Director. See, e.g., Waterhouse v. Hopkins, Case No 87-1167, May 1, 1989, 57 LW 4470, 4473, 4476.

IV. DESIRED RELIEF

1. That this case be remanded to the district court.

2. That the district court be ordered to reopen this case and conduct a trial.

3. Any other relief deemed appropriate by this court.

WHEREFORE, the petitioner prays that this Honorable Court will permit oral argument on the issues presented herein. And following oral argument the court will direct that this case be reopened.

Respectfully submitted,

/s/Curtis L. Wrenn
Curtis L. Wrenn, Pro Se
P.O. Box 203
Fort Drum, NY 13603
Tel: (315) 772-6102

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was mailed to the Attorney General, State of Ohio, State Office Tower, 30 E. Broad Street, Columbus, OH 43215, and Honorable John W. Potter, Judge, U.S. District Court, U. S. Courthouse, Toledo, OH 43624, via U. S. mail, postage prepaid, this 27th day of December, 1990.

/s/Curtis L. Wrenn

No. 91-3009

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In Re: CURTIS L. WRENN, Petitioner.	)	O R D E R

BEFORE: MARTIN and BOGGS, Circuit Judges; and ENGEL, Senior Circuit Judge.

The petitioner filed a petition for a writ of mandamus directing the district court to re-open an employment discrimination action decided adversely to him in 1988. He alleged it was necessary to do so because the district court's judgment therein was "clearly erroneous." Because this court had affirmed that judgment on the merits and the United States Supreme Court had denied a writ of certiorari, this court denied the mandamus petition in an order entered on February 4, 1991. The petitioner now seeks rehearing.

Upon examination of the petition for rehearing,

we conclude that petitioner raises no issues that were not considered previously by the court in denying mandamus relief or which would warrant the relief sought herein.

It therefore is ORDERED that the petition for rehearing is denied.

ENTERED BY ORDER OF THE COURT

/s/Leonard Green
Clerk

APPENDIX D
Page 1 of 10 Pages

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CURTIS L. WRENN,

Petitioner. Docket No 91-3009

RE: Petition for Writ of Mandamus

PETITION FOR REHEARING

COMES NOW the petitioner to respectfully ask the court to reconsider its decision in this case. As grounds for his petition for rehearing the petitioner submits the following for the court's consideration:

1. The basis for the Petition for Writ of Mandamus is NOT for an appeal but rather for the court to review this case and to correct a gross injustice which has been rendered against the petitioner.

2. The district court maintained that the findings of the EEOC (Exhibit 1) "is not evidence of a material fact." The petitioner submits that apparently the primary reason the district court granted summary judgment to the defendants in this

case was that the plaintiff could not present a prima facie case of discrimination. The plaintiff's affidavit AND the EEOC's findings clearly demonstrated his qualifications, including the fact that he has "an MA degree in Hospital Administration." This educational accomplishment clearly met the employer's stated qualifications. Accordingly this court is again being asked to consider that EEOC's findings although not controlling are entitled to "great deference." See, e.g., McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 279, 96 S. Ct. 2574, 49 L.Ed. 2d 493 (1976). Moreover, because the courts have apparently determined that the petitioner did not meet the educational requirement for the position of Executive Director, the EEOC's findings in this case clearly constitute "material facts" to support the petitioner's prima facie case of unlawful discrimination.

3. This court held on January 16, 1990 that "others had better experience or education." This court did not cite any facts it used to arrive at

that conclusion. In that connection, the EEOC's findings clearly serves as "evidence of a material fact" in that it shows the qualifications of the petitioner and those of the white candidate who were hired. The respondents have not produced ANY evidence to refute the EEOC's findings. Thus it is not clear how the courts held, on one hand that the petitioner did not present a prima facie case, and on the other hand held that the "EEOC's findings are not material facts" to demonstrate that there were genuine issues which precluded the granting of summary judgment in favor of the defendants.

4. The facts in this case, especially the Affidavit of Curtis L. Wrenn and the EEOC's findings of three examples of discrimination by the employer, clearly demonstrate a prima facie showing of discrimination which entitles the plaintiff to relief in his favor UNLESS refuted by the employer. The latter has not been accomplished. Moreover, the facts show that more likely than not a discriminatory reason motivated the employer. For example, the employer alleges that the petitioner

was not hired for the position of Executive Director because he did not demonstrate that he possessed the MBA degree. The courts upheld this articulated reason as a "legitimate reason" for denying the plaintiff employment, DESPITE the fact that the successful white applicant, like the plaintiff, did not have the MBA but an MHA. See, e.g. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed. 2d 207 (1981).

WHEREFORE, petitioner asks the court to reconsider its decision that it has already considered all the facts in this case. Petitioner respectfully submits that the court DID NOT give due consideration to pertinent facts as shown.

Respectfully submitted,

/s/Curtis L. Wrenn, Pro Se
P.O. Box 203
Fort Drum, NY 13603
Tel: (315) 772-4025

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was mailed to Ohio Attorney General, 30 E. Broad St., Columbus, OH 43215, and Hon. John W. Potter, 1716 Spielbush, Toledo, OH 43524, on February 9, 1991, via U.S.

mail, postage prepaid.

/s/Curtis L. Wrenn

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
1375 EUCLID AVENUE
CLEVELAND, OHIO 44115

In reply refer to:
Charge Nos. 052821176
052823361
052821864

Curtis Wrenn
P.O> Box 6144
Toledo, Ohio 43614

Charging Party

Medical College of Ohio
3000 Arlington C.S. 10008
Toledo, Ohio 43699

Respondent

DETERMINATION

Under the authority vested in me by the Commissions's Procedural Regulations, I issue, on behalf of the Commission, the following determination as to the merits of the subject charges.

All jurisdictional requirements have been met. Charging Party alleges that Respondent engaged in unlawful employment practices in violation of Title VII of the Civil Rights Act of 1964, as amended, by failing to hire him because of his race, Black; also retaliated 704(a) against him for filing Charge nos. 052791758 and 052811127. The Commission concludes

that there is reasonable cause to believe the charges are true.

Evidence of record shows that on or about February 9, 1982, Charging Party applied for an Executive Director position with the Respondent. The position was advertised in The Toledo Blade newspaper, January 14, 1982 edition. On June 9, 1982, Respondent told the Charging Party that he was not selected. David J. Kolasky, Caucasian, age 41, was selected for the position, and commenced work on January 18, 1983.

Prior to that, Charging Party applied for three (3) vacant positions with the Respondent. Respondent's official sent Charging Party a letter on December 8, 1981, indicating that the position of Administrative Assistant, Department of Psychiatry, had been filled by a candidate whose educational experience and training most closely met the departmental needs. Documented evidence shows that a Caucasian female was selected for the position on December 14, 1981. Her educational background consisted of her attending the University of toledo Community and

Technical College; she expected to receive an Associate Degree in Marketing and Management in December, 1982. Her work experience indicated that she was a secretary in the Chairman's office 1970-1974, administrative secretary to the President and Chairman of the Board 1974-1978, and assistant to the Chairman 1978-1981.

Respondent's advertisement indicated that the appointed person for the position must possess a BS or BA degree in Business Administration or related field; 3-4 years experience in a business environment. Charging Party has more than 10 years of valid hospital management experience, including Administrator of a large hospital and also a small community hospital; Associate Director of a large teaching hospital; and Chief Executive Officer of two (2) psychiatric hospitals. His education consists of a BS degree in Business Administration, a Health Service Administration Development Program certificate, and an MA degree in Hospital Administration.

Respondent's official indicated that the position of

Assistant to the President, which the Charging Party applied for, was filled by a Caucasian male. Evidence of record shows that the selectee educational background consisted of PH.D in Englis, an MA degree in Creative Writing, and a BS degree in English. He had no work experience in the health care field.

Respondent's advertisement indicated that the successful candidate for the position must have an MA degree in Public Health and experience in the health care field. Respondent have no acceptable explanation for their action.

Based on these findings, it is reasonable to conclude that Respondent failed to hire the Charging Party because of his race, Black, and also retaliated against him for filing previous charges, which is in violation of Title VII.

Having determined that there is reasonable cause to believe that the charge is true, the Commission now invites the parties to join with it in a collective effort toward a just resolution of the matter. A "Notice of Conciliation Process" is attached for

your information; a representative of the Commission will contact each party in the near future to begin the conciliation process.

On Behalf of the Commission:

Aug 26 1983
Date

/s/
Chester J. Gray
District Director

Enclosure:
Notice of Conciliation Process

The Blade
September 28, 1982

New Executive Director of MCO Hospital OK'd

Trustees Approve Official Presently in Philadelphia

The Medical College of Ohio board of trustees Monday approved the appointment of David J. Kolasky, vice president of Memorial Hospital, Philadelphia, as executive director of Medical College Hospital, effective Nov. 1.

Mr. Kolasky, 41, will fill a position left vacant since last December when David Benfer resigned to take a job in Grosse Pointe, Mich. The annual salary for the MCO position is $60,000.

Gerald Connolly, who has been the interim hospital director, will resume his post as assistant director.

In the decade before December, 1979, when Mr. Kolasky became vice president at Memorial, he was assistant vice president and associate vice president of Pennsylvania Hospital, Philadelphia.

From January, 1971, to February, 1972, he also was acting executive director of Group Health Planning of Greater Philadelphia, Inc., a group planning a five-county health maintenance organization.

Mr. Kolasky received a bachelor's degree in accounting from Miami University and a master's degree in hospital administration from the University of Michigan.

Dr. Richard Ruppert, MCO president, said he selected Mr. Kolasky from among 10 candidates interviewed at MCO. More than 150 applications for the position were reviewed, he said.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Curtis L. Wrenn,

Plaintiff

Case No. C82-256

vs.

State of Ohio, Medical College of Ohio, et al.,

Defendants

OPINION AND ORDER

POTTER, J.:

This cause is before the Court on defendants' motion for summary judgment, plaintiff's opposition and cross motion for summary judgment, and defendants' reply. Defendants have moved for summary judgment on plaintiff's claims for violations of Title VII and the Age Discrimination in Employment Act, 29, U.S.C. Subsection 621 et seq. Plaintiff claims that defendants refused to hire him for several positions for which he was qualified because of his age, race and/or in retaliation for engaging in protected activity under Title VII.

> Under the Federal Rules of Civil Procedure, summary judgment is proper only where there is no genuine issue of material fact and the moving party is entitled to

> judgment as a matter of law. Fed. R. Civ. P. 56(c). The Supreme Court has recently stated that the inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Ander v. Liberty Lobby, Inc., 106 S. Ct. 2505, 2512 (1986)... . In reviewing a motion for summary judgment, however, all inferences "'must be viewed in the light most favorable to the party opposing the motion.'" See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 106 S. Ct. 1348, 1356-57 (1986) (quoting United States v. Diebold, Inc., 369 U.S. 654, 655 (1962)).

Ralph Shrader, Inc. v. Diamond International Corp., 833 F.2d 1210, 1213 (6th Cir. 1987).

The party moving for summary judgment "always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleading, depositions, answers to interrogatories, and admissions on file, together with the affidavits if any' which [he] believes demonstrate the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The substantive law of the case identifies which facts

are material. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Therefore, only disputes of facts affecting the outcome of the suit under the applicable substantive law will preclude the entry of summary judgment. Id. A moving party may discharge its burden "by 'showing' - that is, pointing out to the district court - that there is an absence of evidence to support the nonmoving party's case." Celotex, 477 U.S. at 324-325. Where the moving party has met its initial burden, the adverse party "must set forth specific facts showing that there is a genuine issue for trial." Anderson, 477 U.S. at 250. "[P]laintiff, to survive the defendant's motion, need only present evidence from which a jury might return a verdict in his favor." Id. at 257.

A plaintiff may establish his prima facie case of age discrimination using the criteria set forth in McDonnell Douglas v. Green, 411 U.S. 792 (1973), for establishing a prima facie case under Title VII. Blackwell v. Sun Electric Corp., 696 F.2d 1176, 1180 (6th Cir. 1983). Similarly,

plaintiff may establish his prima case for retaliation under Title VII using a modified version of the McDonnell Douglas analysis. A plaintiff may also establish his case by direct or circumstantial evidence. Blackwell, 696 F.2d at 1180.

Defendants assert that plaintiff has failed to present any evidence in support of his claims. The moving party may discharge its burden on summary judgment by pointing out to the Court that there is an absence of evidence to support the nonmoving party's case. Celotex, 477 U.S. at 324-325. In reviewing the pleading, depositions, affidavits and other matters submitted in support of and opposition to summary judgment, the Court has considered that plaintiff is a pro se litigant. Notwithstanding plaintiff's lack of legal training and viewing all materials most favorably for plaintiff, the Court has been unable to determine from the record before it that any evidence exists which could support plaintiff's claims. Although plaintiff has adequately set forth various legal doctrines under which he could possibly prevail, he has completely

failed to set forth any specific facts from which a trier of fact might return a verdict in his favor.

Plaintiff may not rely on the EEOC determination as it is not evidence of a material fact. Plaintiff's bare assertion that he was not hired because of retaliation is not sufficient to overcome a properly supported motion for summary judgment. Even if the court were to assume plaintiff had established a prima facie case, which it cannot, plaintiff has failed to present specific facts in opposition to defendants' asserted nondiscriminatory reasons for not hiring him. Accordingly, the Court finds the evidence so one sided that defendants must prevail as a matter of law.

THEREFORE, for the foregoing reasons, good cause appearing, it is

ORDERED that defendants' motion for summary judgment be, and hereby is, GRANTED: and it is

FURTHER ORDERED that plaintiff's cross motion for summary judgment be, and hereby is, DENIED.

/s/John W. Potter
United States District Judge

I hereby certify that this instrument is a true and correct copy of the original on file in my office.
Attest: James S. Gallas, Clerk
U.S. District Court
Northern District of Ohio

By: /s/Carol J. Rizuy
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

CURTIS L. WRENN,
Plaintiff

vs

STATE OF OHIO, MEDICAL COLLEGE OF OHIO, et al
Defendants

Case No. 82-256

AFFIDAVIT OF CURTIS L. WRENN

NOW COMES the plaintiff, Curtis L. Wrenn, to state the following:

I was born to King George and Viola Head Wrenn on February 14, 1930 in Emille, Alabama.

I am a graduate of A.H. Parker High School, Birmingham, Alabama. Post-high education includes various military schools prior to my retirement from the United States Army on December 1, 1970; a bachelor degree in Business from the University of Nebraska-Omaha: a certificate in health care administration from the University of Alabama-Birmingham; and a master's degree in health care administration from the Medical College of Virginia-Virginia Commonwealth University.

My professional recognition includes being elected a Fellow in the American Academy of Medical

Administrators.

My work experience in hospital and health care administration includes the following;

1. Administrator, Richmond Community Hospital, Richmond, Virginia from November 1970 to August 1973.

2. Administrative Resident, Medical Center Hospitals, Norfolk, Virginia from August 1974 to April 1975.

3. Corporate Director of Personnel, Medical Center Hospitals, Norfolk, Virginia from April 1975 to April 1976.

4. Associate Director for Administration, University of Maryland Hospital, Baltimore, Maryland from May 1976 to July 1978.

5. Administrator/Chief Executive Officer, Anoka State Hospital, Anoka, Minnesota from August 1978 to December 1979.

6. Superintendent, Toledo Mental Health Center, Toledo, Ohio from December 1979 to December 1980.

7. Self-employed health care management consultant, Minority Health Care Consultant, Inc.

from January 1981 to September 1983.

8. Executive Director, Whitney M. Young, Jr. Health Center, Inc. Albany, New York from October 1983 to present.

During the period August 21, 1981 to present I have made numerous applications for employment with the Medical College of Ohio. The applications consisted of the following:

1. My first employment application was submitted on or about August 21, 1981 to Mr. David W. Benfer. Mr. Benfer reply was "we have no openings in Hospital Administration at this time. ... Your resume will be kept on file in the event of such a vacant position in the future." A copy of this correspondence is at Exhibit A.

2. In response to advertisement in The Toledo Blade I submitted an application for each of the following positions on the date indicated:

a. Assistant to the President, on or about September 21, 1981

b. Administrative Assistant-Psychiatry Department, on or about November 1, 1981.

c. Ambulatory Care Director, on or about November 22, 1981.

After not receiving a response to my applications, I submitted a second application for the position of Assistant to the President on or about November 12, 1981. A copy of the advertisements is at Exhibit B and a copy of the second application is at Exhibit C. After not receiving a response to any of the applications, I submitted another application by certified mail on December 2, 1981, a copy of which is at Exhibit D.

3. In response to an advertisement in Hospitals I submitted an application for the position of Executive Director to Mr. John D. Ray on or about January 14, 1982. A copy of the advertisement is at Exhibit E. After not receiving a response to my application, I submitted a second application on or about February 9, 1982 to Dr. Richard D. Ruppert, a copy of which is attached as Exhibit F.

4. In response to an advertisement in The Toledo Blade I submitted an application for the position of Assistant Hospital Director on or about September 1,

1983. I was interviewed for the position on or about September 18, 1983. After not receiving any information concerning the disposition of application, I submitted an inquiry to Mr. David J. Kolasky on or about October 23, 1983. Mr. Kolasky's response was "we are continuing to interview people and will make a decision with regard to the position." To date I do not know the disposition of my application for the position of Assistant Hospital Director. A copy of the correspondence is at Exhibit G.

As a result of being denied employment and believing that the denials were racially motivated, I have filed three charges of employment discrimination against the Medical College of Ohio with the Equal Employment Opportunity Commission (EEOC), the United States Department of Education (USDE), and the United States Department of Health and Human Services (USDH & HS). The USDH&HS deferred the charges to EEOC. I do not know the disposition of the USDE. The EEOC found "reasonable cause to believe the charges are true". The Justice

Department issued a Notice of Right to Sue on or about October 6, 1983. A copy of the Notice of Right to Sue, the charges and the EEOC Determination are attached as Exhibit H. (The charge number 052822361 includes a charge of age discrimination because the person hired date of birth is January 15, 1941 and appears to be less qualified for the position of Executive Director.)

AFFIDAVIT

STATE OF NEW YORK)

) ss

COUNTY OF ALBANY)

Subscribed and sworn to before me this _____ day of June 1984.

/s/_____ _____

NOTARY

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Curtis L. Wrenn,	:	
Plaintiff,	:	Case No. 82-256
v.	:	Honorable John Potter
State of Ohio, Medical College of Ohio, et al.,	:	PLAINTIFF'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW
Defendants.	:	

.....

FINDINGS OF FACT

Defendant State of Ohio Medical College of Ohio (MCO) is a non-profit corporation doing business within Lucas County, Ohio. The Board of Trustees of MCO is its governing entity.

Plaintiff Curtis L. Wrenn is a black male, age 55 years, who was denied several executive level positions at MCO during 1981 and 1982, including Assistant to the President; Administrative Assistant, Psychiatry Department; Ambulatory Care Director; and, Executive Director of MCO. He is well qualified in the area of hospital and health care administration and has been employed as Executive Director at Whitney M. Young, Jr. Health

Center, Inc. in Albany, New York from October 1983 to present.

During the period August 21, 1981 to present, Curtis Wrenn made numerous applications for employment with the Medical College of Ohio. Curtis Wrenn's first employment application for an executive level position was submitted on or about August 21, 1981. Defendants' reply was "we have no openings in Hospital Administration at this time ... Your resume will be kept on file in the event of such a vacant position in the future."

Subsequently, in response to advertisements in The Toledo Blade, Curtis Wrenn applied for the position of Assistant to the President, on or about September 21, 1981, Administrative Assistant-Psychiatry Department, on or about November 1, 1981, and Ambulatory CAre Director, on or about November 22, 1981. After not receiving a response to his applications, Curtis Wrenn submitted a second application for the position of Assistant to the President on or about November 12, 1981. After not receiving a response to any of the applications,

Curtis Wrenn submitted another application by certified mail on December 2, 1981. Curtis Wrenn did receive an interview for the Ambulatory Care Director position, but was not hired.

In response to an advertisement in Hospitals, Curtis Wrenn submitted an application for the position of Executive Director on or about January 14, 1982. After not receiving a response to his application, Curtis Wrenn submitted a second application on or about February 9, 1982. In each case set forth above, Curtis Wrenn received no response to his application and/or was denied the position further, in each instance the position was filled by a white person and/or a person younger than Curtis Wrenn; and in each case, Curtis Wrenn was equally or more qualified than the person hire. Defendants allege that the position of Ambulatory Care Director was never filled.

Curtis Wrenn filed charges of intentional unlawful employment discrimination in hiring against defendant, MCO, with the Equal Employment Opportunity Commission. The EEOC found probable

cause to believe that unlawful discrimination did exist as charged by Curtis Wrenn. Defendants declined conciliation. A right-to-sue notification was issued to Curtis Wrenn on October 6, 1983 by the EEOC.

The defendants' decision(s) not to hire Curtis Wrenn were based upon defendants intentionally and maliciously retaliating against Mr. Wrenn for his having filed previous charges of unlawful race discrimination in employment and/or were based impermissibly upon Curtis Wrenn's age.

Curtis Wrenn remained unemployed from April 28, 1981 until October 17, 1983.

CONCLUSIONS OF LAW

Jurisdiction and venue are proper in this judicial district and division.

Defendants' actions in their decision(s) not to hire Curtis Wrenn constitute violations of the Civil Rights Act of 1964, 42 U.S.C. Subsection 2000e, et seq., 42 U.S.C. Subsection 2000(d), et seq. and constitute intentional unlawful retaliation against plaintiff for his assertion of his Constitutional

rights and/or defendants' actions constitute violations of ADEA, willful discrimination against Curtis Wrenn based upon his age.

As a direct and proximate result of the actions of defendants, Curtis Wrenn has suffered injury and damage for which he is entitled to compensation. Further, as a result of the intentional and malicious conduct of defendants, Curtis Wrenn is entitled to punitive damages.

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing was duly served upon Richard W. Ross, Assistant Attorney General, and William J. Steele, Assistant Attorney General, State Office Tower, 30 East Broad Street, Columbus, Ohio 43215, personally, this 18th day of January, 1985.

/s/James H. Banks
Trial Attorney for Plaintiff
620 Alum Creek Drive
Suite 201
Columbus, Ohio 43205
(614) 252-0752

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Curtis L. Wrenn,	:	
Plaintiff,	:	Case No. 82-256
v.	:	Honorable John Potter
State of Ohio, Medical College of Ohio, et al.,	:	TRIAL BRIEF OF PLAINTIFF
Defendants.	:	

.....

TRIAL BRIEF OF PLAINTIFF
Curtis L. Wrenn

Tommie L. Allen
316 N. Michigan Street
Suite 340
Toledo, Ohio 43624

and
Defendants

James H. Banks
620 Alum Creek Drive
Suite 201
Columbus, Ohio 43205
(614) 252-0742
Trial Attorney for Plaintiff

Richard W. Ross
William J. Steele
Assistant Attorney General
State Office Tower
30 East Broad Street
Columbus, Ohio 43215
Attorneys for

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I. STATEMENT OF FACTS

Plaintiff is a black male, age 55. He is well qualified in the area of hospital and health care administration and has been employed as Executive Director at Whitney M. Young, Jr. Health Center, Inc. in Albany, New York from October 1983 to present.

During the period August 21, 1981 to present, plaintiff made numerous applications for employment with the Medical College of Ohio. Plaintiff's first employment application for an executive level position was submitted on or about August 21, 1981. Defendants' reply was "we have no openings in Hospital Administration at this time . . . Your resume will be kept on file in the event of such a vacant position in the future."

Subsequently, in response to advertisements in The Toledo Blade, plaintiff applied for the position of Assistant to the President on or about September 21, 1981, Administrative Assistant-Psychiatry Department, on or about November 1, 1981, and Ambulatory Care Director, on or about November 22,

1981. After not receiving a response to his applications, plaintiff submitted a second application for the position of Assistant to the President on or about November 12, 1981. After not receiving a response to any of the applications, plaintiff submitted another application by certified mail on December 2, 1981.

In response to an advertisement in Hospitals, plaintiff submitted an application for the position of Executive Director on or about January 14, 1982. After not receiving a response to his application, plaintiff submitted a second application on or about February 9, 1982. In each case set forth above, plaintiff received no response to his application and/or was denied the position; further, in each instance the position was filled by a white person and/or a person younger than plaintiff; and in each case, plaintiff was equally or more qualified than the person hired. Defendants allege that the position of Ambulatory Care Director was never filled.

As a result of being denied employment, plaintiff

filed three charges of employment discrimination based upon age, race and/or retaliation against the Medical College of Ohio with the Equal Employment Opportunity Commission (EEOC). The EEOC found probable cause that defendants engaged in unlawful employment discrimination against plaintiff.

Plaintiff now seeks redress for defendants' unlawful acts under Title VII, 42 U.S.C. Subsection 2000(e), et seq.; Title VI, 42 U.S.C. Subsection 2000(d) et seq.; and the Age Discrimination in Employment Act, 29 U.S.C. 621 et seq..

STATEMENT OF LAW

This is a civil action instituted by Curtis Wrenn, a black male, against State of Ohio Medical College of Ohio (MCO), and the Board of Trustees of MCO. The gravemen of plaintiff's claim alleges a violation of his rights because of his race, black, and because of his age 55 years. There was also visited upon plaintiff perpetrated retaliatory scheme orchestrated by defendants.

The facts clearly show plaintiff is a black American whose age places him in a protected group. He applied for not one, but several jobs for which he was well qualified, but in spite of his qualifications and experience, he was rejected by defendants while they continued to search for persons of plaintiff's qualifications. See McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973).

Section 704(a) of the Civil Rights Act of 1964, 42 U.S.C. Subsection 2000e 3(a), provides, in relevant part, that:

> "It shall be an unlawful employment practice for an employer to discriminate against any of his

> employees or applicants for employment...because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under his subchapter."

To establish a prima facia case of retaliation against plaintiff it is not necessary that the person charged by plaintiff be the same person against whom plaintiff now charges retaliation. All that is necessary is that a charge has been made, and this can include a former employer. Barela v. United Nuclear Corp., 462 F.2d 149 (10th Cir. 1972). Womack v. Munson, 619 F.2d 1292, 22 FEP 1079 (8th Cir. 1980) cert. denied 450 U.S. 979 (1981). Further, it has been held that adverse action taken by an employer within six (6) months of the dismissal of administrative proceedings on a charge of discrimination is presumed to be based upon retaliatory motive. Hochstadt v. Worcester Foundation for Experimental Biology, 425 F. Supp. 318 (D. Mass. 1976). An employer's refusal to hire an applicant because he had filed charges with an

agency such as EEOC constitutes illegal retaliatory discrimination. East v. Romine, Inc., 518 F.2d 332 (5th Cir. 1975). Clearly, then, in the actions of defendants in failing to hire plaintiff on four distinct occasions after his filing of his charge of discrimination with the Ohio Civil Rights Commission, one can infer that the basis of the non-hire was retaliation against him for having filed the charge.

In a retaliation case, the plaintiff has the initial burden of proving a prima facia case of retaliation. The burden then shifts to defendant to establish a legitimate reason for its action. If the defendant can do so, then plaintiff has the burden of showing defendant's reason to be pretestual. The Sixth Circuit in Sutton v. National Distillers Products, 445 F. Supp 1319, 16 F.E.P. 1031 (S.D. Ohio 1978), aff'd 628 f.2d 936 (6th Cir. 1980) found that a prima facia case of retaliatory discrimination could be established if the plaintiff's participation in a protected activity "(1) played any part in the challenged action, (2)

played a substantial factor in the challenged action, (3) was the principal, though not the sole reason for the employer's action, (4) or whether or not the adverse employment action would have taken place had there been no protected activity." [emphasis added]. The southern District of Ohio had adopted the position that if the protected activity played any part in the challenged action, unlawful retaliation can be presumed.

Kornbluh v. Stearns and Foster Co., 73 F.R.D. 307, 14 F.E.P. 847 (S.D. Ohio 1976). The Supreme Court, however, supports the "but for" test set forth in the fourth standard in the Sutton case, supra. Thus, plaintiff herein must show that he engaged in a protected activity, that defendants were aware of the protected activity, that plaintiff did not receive the position for which he applied, and that the protected activity was within such period of time that the Court can infer retaliatory motive. Hochstadt, supra.

An inference of retaliatory discrimination is created if, as in the instant case, plaintiff was

equally or better qualified for the position than other applicants or if the position remains open after his application. Stinson v. Tennessee Department of Mental Health and mental Retardation, 553 F. Supp. 545 (M.D. Tenn. 1982). The Stinson case also stands for the proposition that, if plaintiff establishes a prima facia case of employment discrimination and defendant attempts to rebut same, if the legitimate reasons for the defendants' actions can be eliminated, it is more likely than not that the defendant-employer based his decision of impermissible consideration. In cases such as the instant one which involve issues of retaliation and pretextuality, it is sufficient that plaintiff show that retaliation played any part in defendants' refusal to hire him, and a showing of another sufficient cause does not remove the issue. Kornbluh, supra.

In the instant case, there can be no dispute that plaintiff filed charges of employment discrimination (a protected activity) against his former employer, for it made wide-spread publicity in Toledo, Ohio.

Given the above, and given the fact that persons with lesser education and experience than plaintiff were hired for the positions for which he applied, one can infer that defendants had a retaliatory motive for not hiring plaintiff. This motive becomes more apparent given the fact that one of the positions was never filled.

Courts have recognized that proof of overt racial discrimination and retaliation in employment is seldom made by direct evidence. United States v. Jacksonville Terminal Company, 451 F.2d 418 (5th Cir. 1971), cert. denied 406 U.S. 906 (1972). An employee or applicant is at an inherent disadvantage in gathering hard evidence of employment discrimination. Senter v. General Motors Corporation, 532 F.2d at 527. It is for this reason that courts in general acknowledge the value of circumstantial evidence in establishing discrimination. See, Afro American Patrolmen's League v. Duck, 503 F.2d 294 (6th Cir. 1974). Ordinarily the comparative qualifications of the candidates are relevant, and plaintiff must

establish he is at least equally qualified as the employee chosen. McDonnell-Douglas Corp., supra.

Equitable relief in the form of back pay is authorized as to plaintiff should he prevail in this matter by 42 U.S.C. Subsection 2000(e) et seq. pursuant to 28 U.S.C. Subsection 1343(4) which provides in relevant part that a Federal Court may award "damages or...equitable or other relief under any act of Congress providing for the protection of civil rights." See, also, Johnson V. Railway Express Agency, Inc., 421 U.S. 454, 95 S. Ct. 1716, 44 L.Ed 195 (1975). Plaintiff is entitled to back pay, including wages, fringe benefits, insurance and interest in such an amount as to make him whole for the discriminatory treatment to which he was subjected by defendants. Hatton v. Ford Motor Co., 508 F. Supp. 620, 25 F.E.P. 314 (E.D. Mich. 1981), E.E.O.C. v. Wooster Brush Co., 26 F.E.P. 1602 (N.D. Ohio 1981), Satty v. Nashville Gas Co., 18 F.E.P. 493 (M.D. Tenn. 1978). Given a finding of unlawful discrimination, "back pay should be denied only for reasons which, if applied generally, would not

frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination. Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975). "A court should award back pay unless exceptional circumstances indicate otherwise." Crosby v. United States, 427 F. Supp. 547 (S.D. Ohio 1979). Plaintiff is also entitled to pre-judgment interest, Singer v. Mahoning County Board of Mental Retardation, 379 F. Supp. 986 (N.D. Ohio 1974), aff'd, 519 F.2d 748 (6th Cir 1975), Ramey v. Cincinnati Enquirer, inc., 508 F.2d 1188, (6th Cir. 1974), and plaintiff is also entitled, should he prevail in this case, to an award of attorney fees. Such an award is proper pursuant to 42 U.S.C. Subsection 2000(e)-5(k), providing that:

> In any action or proceeding under this title the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

The rationale for awarding attorney fees to prevailing plaintiffs in civil rights actions was first enunciated by the Supreme Court in Newman v. Piggy Park Enterprises, 390 U.S. 400 (1968), and calls for an award of attorney fees "ordinarily" absent "special circumstances". Costs of litigation are also a proper element in the award, even though they are not expressly mentioned in the statute. E.E.O.C. v. I.U.E., Local 758, 631 F.2d 81 (6th Cir. 1980).

Title VI of the Civil Rights Act of 1964, Subsection 601 provides, in relevant part, that:

> "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

A private right of action under Title VI has been found to exist. See Cannon v. University of Chicago, 441 U.S. 677, 99 S. Ct. 1946, 60 L.Ed. 2d 560 (1979). The same standards apply in a Title VI case as those in a Title VII case, and the same remedies are available to a Title VI litigant as are

available to a Title VII litigant. Guardians Association of the N.Y.C Police Department, Inc. v. Civil Service Commission, 466 F. Supp. 1273 (S.D.N.Y. 1979) rev'd on other grounds, 633 F.2d 232, 23 F.E.P. 677 (2d Cir. 1980), cert. den. 25 F.E.P. 1683 (1981).

The requirements for establishing a prima facia case of age discrimination in employment and the burden of proof have been held to be essentially the same as for a Title VII action. Loeb v. Textron, 20 F.E.P. Cases 29 (1980). The protected age group in ADEA cases is 40 through 69. Plaintiff clearly falls within that protected class. 29 U.S.C. Subsection 623 provides, in relevant part, that:

> "(a) It shall be unlawful for an employer--(1) to fail or refuse to hire...an individual...because of such individual's age..."

The BFOQ (bona fide occupational qualification) defense cannot be asserted by defendants herein for their failure to hire plaintiff. The BFOQ defense is to be narrowly construed. Dothard v. Rawlinson, 433 U.S. 321, 97 S. Ct. 2720, 53 L.Ed. 2d 786 (1977). Safety and efficiency in performing a job

are the main standards which comprise the BFOQ defense. Houghton v. McDonnell Douglas Corp., 553 F.2d 561 (8th Cir. 1977), cert. den, 434 U.S. 966 (1977). The positions for which the plaintiff in the instant action applied do not require activity such to make safety and efficiency based on age of major importance.

The plaintiff to prevail on his claim of age discrimination, he must prove that (1) he is a member of the protected age group (40-69 years of age), (2) he was adversely affected by an employer's action, and (3) the employer took such action because of plaintiff's age. Plaintiff need not prove that age was the sole factor in the adverse employment decision. Laugesen v. Anaconda Co., 510 F.2d 567 (6th Cir. 1975).

A successful ADEA plaintiff is entitled by the Act to compelled employment, reinstatement, promotion and back pay. Courts are split as to whether compensatory damages for pain and suffering are also recoverable. Pursuant to 29 U.S.C. Subsection 626(b), a successful ADEA plaintiff who

has shown a willful violation of the Act is entitled to liquidated damages in the amount of twice the actual damages incurred. A willful violation in an ADEA case has been defined as:

> "violations which are intentional, knowingly and voluntarily made as distinguished from accidental, innocent or for good reason acts.
>
> The court believes that willful goes beyond conduct that can be characterized as careless, or unknowing, or unintentional" Hodgson v. Ideal Corrugated Box Co., 8 E.P.D. Subsection 9805 at 6373 (N.D. W.Va. 1974).

And the Third Circuit has held that a showing that the employment action was made voluntarily and with reckless disregard of the consequences constitutes willfulness. Wehr v. Burroughs Corp., 619 F.2d 276 (3rd Cir. 1980).

Should plaintiff prevail on his age claim, he would be entitled to an award of attorney fees over and above any other award. Alyeska Pipeline Serv. Co. v. Wilderness Society, 421 U.S. 240, 93 S. Ct. 1612, 44 L.Ed 2d 141 (1975).

CONCLUSION

Based upon evidence to be presented at trial, plaintiff will show that he has met each and every element necessary to establish a prima facia case of unlawful retaliatory discrimination and/or race and/or age discrimination and that any reason that defendants could put forth as legitimate for plaintiff's non-hire is pretextual. Thus, plaintiff must prevail on his claim of unlawful employment discrimination.

Should plaintiff prevail in this matter, his counsel reserve the right to submit affidavits and time and expense statements setting forth attorney fees and expenses and/or hereby request an evidentiary hearing on the amount of same.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing was duly served upon Richard W.

Ross, Assistant Attorney General, and William J. Steele, Assistant Attorney General, State Office Tower, 30 East Broad Street, Columbus, Ohio 43215, personally, this 18th day of January, 1985.

/s/James H. Banks
Trial Attorney for Plaintiff